

Supreme Court ruling complicates new water uses

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In a little-noticed decision overturning a water permit for a small city east of Olympia last month, the state Supreme Court raised new questions about how much flexibility the state has to approve new water uses.

Depending on interpretation, the decision could either broadly throw a wrench in the Department of Ecology's ability to balance the need for new water use with environmental protections or narrowly affect a limited number of river basins, not including the Yakima.

The confusing and possibly far-reaching implications of the court's 6-3 decision lead the ecology department to take the rare step of asking the court to re-consider the ruling.

The case centers on a plan the department approved for the city of Yelm to draw more water from the protected Nisqually River than its existing water rights cover.

Ecology used a process known as "overriding consideration of public interest," or OCPI, for short, to conclude that the benefit of Yelm's mitigation plan to invest in habitat restoration, protection, and retiring of other water rights outweighed the negative impact of the water use.

But the court said that Ecology unlawfully used OCPI, which it said was only intended for use in extraordinary circumstances, not routine questions of urban growth and increased water need.

A narrow reading of the decision wouldn't have any impact on the Yakima River Basin, said Tom Loranger, water resources section manager for the agency.

"It does limit our ability to do mitigation in basins that have adopted in-stream flow rules, but the Yakima River does not have minimum flows set by the state," Loranger said.

Areas that would be effected include the Wenatchee and White Salmon river basins, he said.

But Jason Mercier with the Washington Policy Center said he's concerned that another aspect of the court's decision could have even broader impact.

"The reason it matters is that in coming to their 6-3 decision, the court re-interpreted the definitions of withdrawal and appropriation," Mercier said. "Up to this point, withdrawal or appropriation have been used interchangeably in water law, but this court said withdrawal means temporary and that has some pretty consequential unintended consequences."

As an example, hundreds of thousands of homeowners have private wells that are permit-exempt under a state law that describes their water use as a withdrawal. Mercier worries this decision could put those homeowners at risk.

Loranger agreed that the term withdrawal has been commonly used in the state's water code and it has not been defined as temporary before.

But he said the impacts of the court's ruling on that issue remain unclear.

What's also unclear is when the Supreme Court will respond to the request for reconsideration. There's no set time frame for such decisions, so it could be months or years, Mercier said.

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